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No. 90-1171

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

COMMUNITY NATIONAL BANK,

Petitioner,

vs.

RICHARD W. SHERK, JR.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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The Respondent, Richard W. Sherk, respectully requests this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion.

COUNTERSTATEMENT OF THE CASE

The facts of this case were found by Judge Larry E. Kelly, Chief U.S. Bankruptcy Judge of the United States Bankruptcy Court for the Western District of Texas-Austin Division (Appendix 8a-24a), to be substantially as set forth in the Petition, with the following modification:

Petitioner claims that it purchased the property in question "pursuant to an agreement with [Respondent] Sherk that [Petitioner] CNB would convey the homestead to Sherk or his nominee for payment in cash of the bank's cost in the property." Petition for Writ of Certiorari, Pages 4-5. That is incorrect. There were no agreements between Petitioner and Respondent at the time of the foreclosure sale. Judge Kelly found that although "the evidence indicates that there were

some discussions wherein Sherk requested that CNB allow Sherk to find a buyer for the home," (Finding of Fact 5, Appendix 13a), "there was no agreement that prevented CNB from disposing of the property to its own choice of buyers, however, should one be located" (Finding of Fact 7, Appendix 14a). Judge Kelly further found no evidence "of any specific or enforceable agreement" by which CNB would "hold" the title for Sherk or Sherk's nominee. (Finding of Fact 12, Appendix 16a-17a). The only evidence of any sort of agreements concerned acts occurring weeks after the March 3, 1987, foreclosure sale. (Findings of Fact 6-8, 10, Appendix 13a-15a).

REASONS FOR DENYING THE WRIT

This case concerns how courts should interpret the term "reasonably equivalent value" as used in Section 548 of the U.S. Bankruptcy Code, 11 U.S.C. §548(a)(2)(1978). Petitioner claims that the holding of the Fifth Circuit Court of Appeals in Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (1980), conflicts with that of other circuit courts, thereby producing an inconsistent application of federal bankruptcy law. The issue arises because Congress has not defined "reasonably equivalent value".

In Durrett, the Fifth Circuit Court of Appeals held that 57.7% of the fair market value of the property sold at the foreclosure sale was not a "fair equivalent" of the property because the bankruptcy estate was thereby deprived of an equity in the property of $84,600.00. 621

F.2d at 203. (Durrett was decided under the Bankruptcy Act, and the Act's corresponding statute, 11 U.S.C. §107(d)(1), (e)(1), used the term "fair equivalent" rather than the current statute's "reasonably equivalent value.") The court pronounced this "in light of the record made in the district court and the applicable case law". Ibid. In dictum, the court simply notes that it was unable to find a district or appellate court decision approving of a similar transfer for less than 70% of the property's fair market value.

While some courts have subsequently interpreted that case as delineating a 70% benchmark, the Fifth Circuit Court of Appeals has never adopted a 70% bright-line test by holding that such a ratio between purchase price and fair market value is the only factor to be considered.

In the present case, the Bankruptcy Court was presented with a situation more egregious than that in Durrett, as only 49% of the fair market value was paid at the foreclosure, compared to the 57.7% in Durrett. (Findings of Fact 6 and 11, Appendix 13a and 16a). When the Bankruptcy Court states that "as a matter of law" the sale price was not a reasonable equivalent value, and cites Durrett, that is all to which the Court is referring. Conclusion of Law 3, Appendix 20a.

In Bundles v. Baker (In re Bundles), 856 F.2d 815 (1988), the Seventh Circuit Court of Appeals said that "the court should neither grant a conclusive presumption in favor of a purchaser at a regularly conducted, non-collusive foreclosure sale, nor limit its inquiry to a simple comparison of the sale price to the fair market value. Bundles, 856 F.2d at 824.

The Seventh Circuit did not reject outright the holding of Durrett:

> The [Fifth Circuit] court's reference to 70 percent has led other courts and commentators to read that opinion as establishing a fixed percentage mark--the so-called 'Durrett 70 percent rule'. However, the Fifth Circuit's actual approach in Durrett is one of simply analyzing the question of reasonably equivalent value in terms of whether the foreclosure sale price is some acceptable percentage of the fair market value of the property."

Bundles, 856 F.2d at 820.

The Seventh Circuit thus recognizes that the Fifth Circuit has not restricted this inquiry to only a pure 70% rule, but rather whether, in light of all the evidence, an acceptable portion of the fair market value was paid.

It is true that different circuits have taken divergent approaches when applying the term "reasonably equivalent value" to specific facts. Respondent

disagrees, however, that the various approaches resulting from different fact scenarios have led to noticeable discrepancies in the application of federal bankrupty law. The Seventh Circuit boasts few cases where a sale price below 70% of fair market value was deemed to be reasonably equivalent value. The issue is an ephemeral one, for the results under Durrett and Bundles appear similar, just reached by different means. One questions, too, how often forum shopping would ever occur because of slight discrepancies. The likelihood of setting aside a non-judicial foreclosure sale as a fraudulent conveyance does not depend upon the circuit in which the debtor lives, despite the implication of Petitioner. A review of cases demonstrates that Congress' failure to define the term "reasonably equivalent value" has not resulted empirically in

in grossly disparate results, as may be witnessed from Petitioner's failure to make any such showing.

Petitioner implies that had the Fifth Circuit Court of Appeals used the approach of the Seventh Circuit in applying "reasonably equivalent value" to the facts of this case, the court would have ruled that the standard had been met. However, even under the Seventh Circuit's approach, it is unclear how the transfer at issue could be said to have given Respondent the reasonably equivalent value of the property transferred.

Petitioner urges that Respondent received reasonably equivalent value because Respondent allegedly, as part of the sale, retained the right to recover all his equity in the property through a lease-purchase agreement with a subsequent purchaser. That is patently untrue. The

Bankruptcy Court did not find that Respondent received one dime as a result of the subsequent sale a month after the foreclosure sale by petitioner to Texas Bankers or any other event which has occurred subsequent to the foreclosure. There was also no evidence introduced of a valid enforceable agreement, nor a finding of fact as to any specific enforceable right which the debtor obtained as a result of consenting to this sale to Texas Bankers. Petitioner never discloses to this Court the fact that all of these purported "agreements" occurred after the foreclosure sale at issue, and furnished no part of the consideration for same. (Findings of Fact 6-12, Appendix 13a-18a).

All Judge Kelly found was that "Sherk had entered into some agreement with Texas Bankers that if it acquired the homestead property, he would enter into some form of

lease/purchase agreement in order to reacquire it." (Finding of Fact 11, Appendix 15a). That was, apparently, some oral agreement, as no written agreement granting such right was offered at trial, and the only document even referencing same was a letter from Texas Bankers written after the purported time for redemption had already expired.

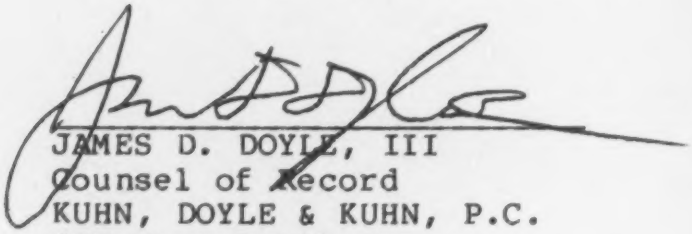
It is elementary that the Statute of Frauds would bar such an agreement's enforceability in the absence of written documentation; and given that fact, it does not appear from the state of the record that the debtor received anything as a result of the transfer, much less the "full value" for his equity, as contended by the Petitioner. Judge Kelly found, on the basis of the Petitioner's appraisal testimony, that the value of the property on the date of foreclosure was

$250,000.00, notwithstanding the Respondent's testimony that the property is worth approximately $324,000.00. (Finding of Fact 11, Appendix 16a). Most importantly, Judge Kelly specifically found that "no evidence was introduced by [Petitioner] CNB of any specific or enforceable agreement relating to such an understanding." (Finding of Fact 12, Appendix 17a). How the Petitioner can seriously contend that the Respondent received reasonably equivalent value for his equity of at least $126,000.00 by virtue of merely consenting to the later sale to Texas Bankers strains credulity.

CONCLUSION

For the reasons set forth above, Respondent respectfully prays that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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